MEMORANDUM

TO: John P. DeVillars, Secretary
Executive Office of Environmental Affairs

Daniel S. Greenbaum, Commissioner
Department of Environmental Protection

FROM: Siting Policy Task Force

RE: Final Report on Hazardous Waste Facility Siting Process Improvements

DATE: December 6, 1990

On October 4, 1990, you convened the Siting Policy Task Force, with the charge of making recommendations for improvements in the Process utilized by the Commonwealth for the siting of hazardous waste facilities. The membership of the Task Force is set forth in Appendix A to this Report. The Task Force met a total of eight times over the two months allocated for its work, and solicited comments and suggestions from a broad range a parties with knowledge and concerns about hazardous waste siting issues.

The recommendations contained in this report reflect the consensus reached by the Task Force during its deliberations.

I. A Diagnosis of the Problem

The most obvious criticism of the Process established by *M.G.L.* c. 21D for the siting of hazardous waste facilities is that, in the ten years since the enactment of the statute, no hazardous waste facility has been sited under it. Continuing along this path would be environmentally and economically dangerous. Even though the Commonwealth has begun to implement the *Toxic Use Reduction Act,* (TURA), *M.G.L.* c.21I, and various recycling efforts are underway, there will be, for the foreseeable future, a component of the waste stream that continues to require disposal.

Chapter 21D, however, has proven to be unsatisfactory to project proponents, local communities, regulators and environmentalists. It has forced everyone who has participated in the Siting Process to spend substantial time, money, energy and resources needlessly.

This is not to say that Chapter 21D has resulted in any "wrong" decisions regarding proposed hazardous waste facilities. While we have not directly examined the merits of any of the five project proposals which entered the Process over the past decade, we recognize that the failure of each of them to be sited resulted substantially from the Commonwealth's not having provided sufficient leadership and guidance in the formulation of environmentally sound proposals. In the absence of such guidance, business and environmental leaders have not developed a consensus favoring the siting of hazardous waste facilities.

Better definition and guidance regarding the Commonwealth's hazardous waste needs and the technologies available to address those needs; more appropriate commitments of state resources to project formulation and site selection; and more effective screening of projects at an earlier stage in the Process would likely have resulted in lower costs to all parties and to the Commonwealth.

Moreover, clear definition of roles and responsibilities in the Siting Process would have helped to eliminate the conflicting mandates of the Hazardous Waste Facility Site Safety Council which has been asked to serve both as a project facilitator and a project regulator.

In the recommendations that follow, we call for a total overhaul of Chapter 21D. We recommend that the Site Safety Council be abolished, and replaced by a Hazardous Waste Facility Development Board, perhaps within the Executive Office of Administration and Finance, which will have a narrow scope of duties, better defined to promote the Commonwealth's interest in improving the management of its hazardous wastes. The Board should consist of only public members, with a maximum of seven, drawn from environmental, business, engineering, public health and municipal interests. Because of the advocacy role to be assigned to this Board, we recommend that no *ex officio* members from the Administration be included on the Board, and that it be isolated from those agencies having a regulatory role with respect to hazardous waste facilities. As elaborated upon below we also recommend more leadership reflecting a greater sense of purpose in developing facilities that address our priority needs.

Because the expectations placed upon the Board are great, it will require independent technical capability and staff; more resources than are currently given to the Site Safety Council; and priority treatment from other state agencies. The allocation of appropriate resources and the acquisition of technical capability and staff will be a significant first test of the state's commitment. The Commonwealth must play a leadership role in siting hazardous waste facilities, and it must be ready to provide relevant agencies with the tools necessary to assume leadership. Without adequate resources and staff, the Board will not be able to perform the important functions assigned to it in this Process

II. New Leadership from the Commonwealth

The purpose of Chapter 21D, when it was enacted in 1980, was "to immediately encourage and expedite the process of development of hazardous waste treatment and disposal facilities which provide adequate safeguards to protect the public health, safety, and environment of the commonwealth." The scope of this purpose has been refined and perhaps limited over the years, but most observers agree that, notwithstanding any progress achieved or expected in reducing our reliance on toxic chemicals, there will remain for the foreseeable future a need for environmentally sound facilities for disposing of hazardous waste. The realities of interstate politics are that this need cannot be met reliably in every instance by facilities located outside Massachusetts.

Everyone generates hazardous waste. Therefore, for the state, its people and its industries, a means of safe and reliable disposal is as important an element of infrastructure as safe roads and adequate electricity. Therefore, both our state's economy and its environmental quality depend on ensuring that the necessary disposal capacity is available to serve the legitimate needs of Massachusetts industry.

Having made these observations, it is important to recognize that the environmental record of the hazardous waste disposal industry has been imperfect. Despite improvements in regulation over the past decade, it is impossible to guarantee the neighbors of a proposed facility that there will be no increase in public health, safety or environmental risk from the facility, or that the regulatory mechanisms are in place and adequately funded to ensure perpetual compliance with state-of-the-art controls on the facility's operation. In fairness, therefore, the Commonwealth should not ask communities to accept hazardous waste facilities unless it is prepared to articulate clearly why the development of a particular facility addresses an important need of the Commonwealth as a whole.

In the absence of reliable information to the contrary, the public has come to believe that development of hazardous waste disposal capacity is not an important priority. In fact, Massachusetts industry is probably not as waste-intensive as that in some states. Our industrial waste may also be more amenable to source reduction efforts. Nevertheless, the need for disposal capacity is not zero and the public needs to understand this. A secure, safe and accessible hazardous waste treatment and disposal network can be an important component of the support needed both to keep and attract industry in Massachusetts, and to ensure the protection of the environment.

In those circumstances where the Commonwealth can articulate a clear need for a hazardous waste facility, and can state that such a need is among the economic development and environmental priorities of the Commonwealth, then it should not be bashful about soliciting and supporting proposals to address such a need. Care should, of course, be taken that the Commonwealth's enthusiasm for a particular proposal is not allowed to compromise careful regulatory scrutiny of the project. However, it is both environmentally unsound and economically unproductive to fail to promote a safe and reliable in-state facility for disposing of hazardous waste when the Commonwealth's own analysis shows such a facility to be among its economic development and environmental protection priorities.

III. Ensuring Leadership in a New Siting Process

The Process we recommend includes two components: One is a regulatory component designed to provide clear lines of decision making authority and to lead promptly to appropriate decisions when projects are proposed. The other is a project advancement component that involves the Commonwealth affirmatively in the development of projects that address its priority needs. While "entrepreneurial" projects that address real needs, but not those identified as the Commonwealth's priorities, can proceed through the regulatory process without the assistance of the Commonwealth, those projects that are proposed in response to the Commonwealth's articulated priorities would benefit from the promotion and assistance of the Commonwealth in the formulation of the total project.

The Project Advancement Component we recommend depends on leadership at the highest level of government, and we believe that it should involve the endorsement of the Governor.

IV. An Outline of a New Siting Process

The principal elements of the new Siting Process we proposed are outlined below:

A. Development and Adoption of Necessary Regulatory Standards

A lesson learned long ago under Chapter 21D is that a siting process cannot proceed comfortably unless clear, well-understood regulatory standards are in place at the outset. The new Siting Process depends on having regulatory standards in place, which are as objective and as specific as possible. All parties benefit from having clear standards before the important decisions about hazardous waste facility development are made.

Of special importance in this regard are regulations governing site suitability. We believe that it is essential for DEP to have clear, objective facility location standards that can be applied relatively early in a project review, without complex risk assessment and environmental impact review, to screen out projects with obvious siting flaws. We also believe that DEP should develop more sophisticated site standards, and promulgate them pursuant to *M.G.L.* c.111, §150B, for use by the site community Board of Health in issuing a site assignment for a proposed facility. These standards can, as appropriate, rely on risk assessment and environmental impact review of a

facility proposal, since the site assignment would be granted, pursuant to Paragraph K below, very near the end of the new Siting Process.

In addition, standards should be promulgated governing:

- Operator Compliance History
- Operator Management History
- Operator and Facility Finances
- Facility Technology

We propose that the Department of Environmental Protection be assigned responsibility for all of these regulatory standards except those governing operator and facility finances. We believe that the Massachusetts Industrial Finance Agency, which typically is asked to provide financial assistance for a hazardous waste facility development even now, is best situated to establish standards for operator and facility finances.

B. Development and Adoption of a Hazardous Waste Management Plan

Also essential to a new Siting Process is the identification of the state's disposal and technology needs, which should be addressed through a Hazardous Waste Management Plan for the Commonwealth. As noted, it is not appropriate for the Commonwealth to ask a local community to accept a hazardous waste facility unless the need for such a facility can be articulated. The Management Plan will articulate the Commonwealth's needs.

Identifying the Commonwealth's needs is no simple task. While it is relatively easy to compile an inventory of waste generated in the Commonwealth and of the facilities currently available for treatment, storage and disposal of various waste streams, making projections for the future is more complicated. A sound Management Plan should take into account the likely results of our efforts to reduce reliance on toxic chemicals under TURA; the Commonwealth's Capacity Assurance obligations under the *Superfund Amendments and Reauthorization Act*, 42 *U.S.C.* §9601 *et seq.*; as well as other economic and political considerations. This Management Plan should reflect this continuum of preferred strategies for hazardous waste management: first, source reduction; second, recycling, exchange, and reuse; third, treatment; and disposal as a last resort.

We anticipate that the Management Plan will have two elements. First, it will identify the state's disposal needs - including hazardous waste generated by households, as well as institutions - and appropriate technology and facilities for addressing these needs. We agree with the Needs Assessment developed by the Site Safety Council in 1987 that "there should be capacity in Massachusetts sufficient to handle waste generated in Massachusetts, but Massachusetts citizens should not have to assume risk disproportionate to the size of the state waste stream." In line with this philosophy, the Management Plan must identify the maximum capacity needs for each waste management technology, above which no application for additional facilities will be considered. We also recognize, however, that complete self-sufficiency is unrealistic, possibly inappropriate and perhaps economically inefficient. The Management Plan will have to take these realities, as well as the need for regional cooperation, into account.

Second, the Management Plan will identify one or a few needs which are of a sufficient priority that the Commonwealth is prepared to utilize the Project Advancement component of the Siting Process to promote their accommodation.

We believe that the development of the Management Plan should be assigned to the new Hazardous Waste Facility Development Board in close cooperation with DEP and EOEA who have responsibility for our Capacity Assurance implementation under federal law. The Board should

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hold public hearings around the Commonwealth and utilize other means to facilitate public participation in an effort to develop a broad consensus on our hazardous waste needs. The Management Plan should be revised and updated biennially.

C. Development of a Facility Request for Proposals

Once the priority needs of the Commonwealth are identified in the Management Plan, we recommend that the Hazardous Waste Facility Development Board proceed to develop an RFP soliciting proposals to address one or more of such needs, which will be submitted to the Governor for approval prior to its issuance. In most circumstances, the RFP should not specify a location for the facility or the precise technology to be utilized by the candidate operator. Responses to the RFP should also not specify a proposed site, unless the candidate is willing to proceed only at a particular site.

A non-site specific RFP will help to focus public review and comment on the issue of need and how well a particular proposal responds to the need. This will in turn help to develop consensus on the merits of a proposal based on need and quality, uncolored by site considerations. Without identifying a site, people would be free to evaluate the possibilities objectively without fear of losing their option to oppose a facility in their community.

The RFP should state as specifically as possible, but generically if necessary, the commitments for assistance that the Commonwealth is prepared to provide to the successful applicant. Such assistance could include, for example, utilizing the Massachusetts Geographic Information Service and other state resources to assist with site selection; providing financial assistance for operator and community participation in the regulatory process through MIFA; associated public or private development activities; or use of the eminent domain power of the Commonwealth to acquire a facility site.

D. Approval of the RFP by the Governor

The RFP should not be issued without the approval of the Governor. The success of the Project Advancement Component of the new Siting Process depends on the commitment of substantial state resources to assisting the selected candidate. Such a commitment, however, is only appropriate if the Commonwealth believes that that the accommodation of a particular hazardous waste need is among its economic development and environmental protection priorities.

Because the commitments of assistance to be specified in the RFP require the cooperation of a broad range of state officials and agencies, they cannot be made without the personal approval of the Governor. Requiring the Governor's approval of the RFP is the only mechanism logically available to ensure that the Commonwealth is prepared to back the project with the same type of commitment it would give to its other economic development and environmental protection priorities. The Governor's approval will signify that he is prepared to direct that the Commonwealth's commitments under the RFP will be effected. Such an assurance is critical to promoting the Commonwealth's interest in sound hazardous waste facility development.

E. Selection of Successful Candidates

Use of a competitive process for selecting facility operators should provide an incentive for candidates to exceed, rather than merely minimally satisfy, the Commonwealth's regulatory standards, thereby improving the quality of the projects advanced by the Commonwealth. The Development Board should be assigned responsibility for selecting the facility operator candidate whose proposal best addresses the Commonwealth's needs. The Board should then reserve for the successful candidate that portion of the waste stream addressed by the proposal, and amend the Management Plan accordingly so that a competing "certificate of need," pursuant to paragraph H

below, will not issued be while the successful candidate is pursuing and making progress towards its facility license.

In making its selections, The Board should obtain the advice and assistance of MIFA in reviewing the operator's and project's finances, and of DEP in reviewing other aspects of the facility proposal. In addition to reviewing the candidate's ability to satisfy the screening steps outlined in Paragraph H below, the Board should make a judgment that the proposed facility is likely to be able to satisfy at least those generic conditions sure to be imposed by DEP in the facility's license (*e.g.*, utilization of Best Available Technology), regardless of where it is located.

F. Providing Technical Assistance in Site Selection

The specific commitments of the Commonwealth to the selected candidate under any particular RFP will, of course, need to be individually stated under Paragraph C, above. However, since site selection is so critical to successful siting, and the Commonwealth is relatively better equipped than project developers to know the characteristics of potential sites, the Commonwealth should provide technical assistance to successful candidates.

At a minimum, such assistance should include placing the resources and staff of the Massachusetts GIS at the disposal of the candidate, so that as many aspects of the siting decision can be explored as data will permit. We recognize that the GIS cannot, by itself, make site selection decisions. However, as the GIS incorporates more data, its power is continually being enhanced, and its value to candidate operators is correspondingly increased.

We expect that the Development Board can also assist in site selection by conducting and maintaining an inventory of federal and state property that might potentially be available for development as a hazardous waste facility. In addition, we hope that the Board can develop incentives for communities to come forward to suggest that particular parcels within their boundaries be screened for site suitability. The identification by the Board of particular sites that seem to be potentially suitable should provide a helpful focus for a candidate operator in selecting a site. The Board can also provide guidance to the GIS on data and criteria that are particularly useful in site selection decision making.

G. Submission of a Notice of Intent

Once a selected candidate picks the site for the facility proposal, the elements of the facility proposal are all in place. The candidate may then proceed to develop and submit the Notice of Intent, which should be filed with the clerk of the City or Town in which the facility is proposed to be located, with copies filed with the Development Board, EOEA, DEP and MIFA. With this filing, the Project Advancement Component of the Siting Process is essentially complete. The Commonwealth may have promised to provide additional financial aid to the project during the Regulatory Component of the Siting Process, but it should otherwise be well understood that the Commonwealth's enthusiasm for a particular project will not compromise its regulatory review.

We recommend that any facility proponent who chooses to submit a Notice of Intent still be permitted to do so, just as they can today, even if the project was not developed pursuant to an RFP.

We envision the NOI under the new Siting Process to be a more comprehensive document than is currently filed, having some of the elements of a RCRA Part B application. The NOI should contain all of the information necessary to make the screening determinations called for in Paragraph H below. The only exception would be that we would allow a facility proponent whose project was not developed pursuant to an RFP to submit a partial NOI addressing need only, and to seek a "certificate of need" pursuant to Paragraph H below without submitting a full NOI.

The NOI must be site specific. Once it is filed, the restrictions of local zoning, which could prohibit the development of the proposed facility, should be "frozen," either as of the date of the NOI or as of the date of the RFP that gave rise to the proposal (if there was such an RFP), whichever is earlier. As under current law, a hazardous waste facility should be considered a permitted use as of right on any land zoned for industrial use.

The filing of the NOI should trigger an entitlement on the part of the site community and any affected community to technical assistance grants paid by the project proponents. Grants should be determined by a formula based on the estimated cost of the project or some other measure of its magnitude. DEP should develop a schedule of payments which will ensure that local communities continue to receive funding throughout the Regulatory Component of the Process, regardless of the circumstances that arise.

A community other than a site community can, upon the filing of an NOI, apply to DEP at any time for designation as an affected community, one which can be reasonably expected to experience significant environmental, social or economic impacts from the development or operation of the proposed facility, either during normal or upset conditions. DEP should develop regulations setting standards for qualifying as an affected community.

H. Facility Proposal Screening

Upon the filing of an NOI, the Development Board must certify that the proposed project conforms to the Management Plan. If the project has been developed in response to an RFP, this should be a *pro forma* step. However, for an "entrepreneurial" project, this will be the Commonwealth's first look at the proposal, and the issuance of a "certificate of need" might be more time-consuming.

Also upon the filing of an NOI, DEP must review the project's site suitability, the proposed operator's compliance and management history and the facility's technological feasibility. The preliminary approvals given by DEP to these aspects of the project should be based on regulatory criteria developed under Paragraph A above, and should be able to be given without requiring an environmental impact report or risk analysis of the project. Similarly, at this point, MIFA must review and approve the operator's and the project's finances.

It should be understood that this is an important screening step, designed to eliminate projects with obvious flaws from further consideration. Nevertheless, project proponents and communities are entitled to have the necessary judgments promptly. We would set a deadline of 45 days from the filing of the NOI for this step to be complete if the project has been developed pursuant to an RFP. For entrepreneurial projects, we would set a deadline of 45 days from the issuance of the certificate of need for the remaining reviews to be complete.

I. MEPA Process

Upon the successful completion of the prior step, a project should be ready for MEPA Review. We regard any hazardous waste facility to be a "major and complicated" project within the meaning of MEPA, and would encourage the Secretary to establish a Citizens Advisory Committee for the project drawn principally from site and affected communities. The Secretary should encourage the CAC to develop a Scope for the EIR, for the Secretary's approval, and to review and approve intermediate documents leading to the DEIR. We recommend abolishing the Socioeconomic Appendix called for under current law, in favor of an integrated EIR which addresses social and economic impacts as well as environmental impacts from the facility.

J. RCRA Part B License

Simultaneously with the filing of an ENF with the MEPA Unit, we would expect the facility proponent to file a RCRA Part B License with DEP. The license, of course, cannot be issued in final form until the final EIR has been accepted by the Secretary. No later than the time that the license is issued, DEP should issue a report to the site community Board of Health concerning the suitability of the site at the proposed facility. This report on site suitability should be based on DEP's risk-based site assignment regulations, issued pursuant to Paragraph A above. Of course, if DEP finds the site to be unsuitable, then it should issue no license, and the project may not proceed.

K. Site Assignment

Also more or less simultaneously with the filing of the ENF should come the application to the Board of Health of the site community for a site assignment. Within 90 days of DEP's certification that the RCRA Part B License application is complete or the issuance of DEP's site suitability report (whichever is later), the Board of Health must act on the application, applying the standards developed by DEP. At least 45 days prior to issuance of the site assignment, the Board of Health must consult with the Board of Selectmen or Mayor and City Council, the local Finance Committee, the Planning Board and Board of Appeals, the Conservation Commission and the Police and Fire Departments regarding any conditions on the site assignment that such officials deem appropriate.

A site assignment approval would be appealable to DEP, while a denial would be appealable to Superior Court. It is hoped that a facility developer will offer to provide the site community with impact mitigations, beyond what DEP requires in licensing, in order to encourage the issuance of a site assignment. Any offers of this type can be written as condition on the site assignment.

L. On -Going Community Compensation

Upon the issuance of the RCRA Part B License, site and affected communities should be entitled to compensation, determined by a formula established well in advance by regulation of the Development Board. Of course, a facility developer is free to offer communities additional compensation beyond what is specified under such a formula in exchange for an agreement by such communities not to appeal the DEP licensing decision or the site assignment.

V. Some Immediate Steps that Can Be Taken Without Legislation

While we believe that a total overhaul of Chapter 21D is needed we recognize that some improvements in the current Process can be adopted now. We have identified some of these for your consideration:

A. Since the Council now makes the "feasible and deserving" determination, it presumably can articulate objective criteria by regulation now governing site suitability and developer qualifications. The current regulations are much too vague and toothless. These new regulations should set two thresholds: a preliminary feasible and deserving determination (more like the original Council procedure) which has the effect only of releasing TAG money, followed by a final feasible and deserving determination which is based on satisfaction of the threshold criteria.

B. The Council can adopt regulations authorizing "holds" in the Process during any period in which it determines that adequate funding is not available. A developer can always lift the "hold" by voluntarily giving a grant to DEM to be distributed to the state or local entity requiring the funding. This mechanism avoids the problem that any fees currently collected by the Council

would go into the general fund of the Commonwealth and would not be available to finance the Process or the communities' participating in it.

C. The Council can adopt regulations requiring communities to share technical consultants and mandating that consultants and lawyers hired by communities satisfy state consultant standards. The regulations can specify that TAGs will be given out in time increments, not for specific tasks.

D. The Council can mandate that a developer file its RCRA Part B application with DEP and its site assignment application with the local Board of Health concurrently with the filing of the ENF. This requirement will have to specify that, if the relevant BOH does not have a regulation authorizing the assessment of a fee to cover the cost of reviewing the site assignment application, then the developer must agree that whatever future regulation is adopted will apply to its application.

E. The Council can adopt a regulation which will authorize it to approve all SEA protocols specified in the SEA Scope prior to their implementation.

F. The Massachusetts GIS can be directed by the Secretary of EOEA to issue a report identifying the areas of the Commonwealth most likely to have suitable sites for hazardous waste facilities, and to update that report annually (or as appropriate).

G. The Council can adopt regulations formalizing the participation of affected communities in the Process, perhaps by granting them intervener status.

H. The Council can (and indeed has already begun to) coordinate its deliberations with those of DEP and MIFA.

I. DEP can begin immediately to develop site assignment standards to be used pursuant to *M.G.L.* c.111, §150B. We recognize that this is a significant undertaking, and therefore urge particularly that work begin as soon as possible. DEP may wish to defer the question of applicability of such standards to existing facilities until the Supreme Judicial Court has spoken on the subject, but this deferral should not justify continued delay in the development of any standards at all.

APPENDIX A

Members of the Siting Policy Task Force

Regina McCarthy (Hazardous Waste Facility Site Safety Council chair), co-chair

Lynn Rubinstein (Franklin County land use planner) co-chair, Hazardous Waste Advisory Committee, Massachusetts Municipal Association

Mitchell Briskin (General Chemical Corp.)

Richard Cahaly, (Associated Industries of Massachusetts, Hazardous Waste Advisory Committee)

Joan N. Gardner, Hazardous Waste Facility Site Safety Council

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